

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

In the matter of XO Illinois, Inc.	)	
Petition for Arbitration pursuant to	)	
Section 252 (b) of the Telecommunications	)	Docket No. 01- 0466
Act of 1996 to establish an Interconnection	)	
Agreement with Illinois Bell Telephone	)	
Company d/b/a Ameritech Illinois	)	

**MOTION TO STRIKE**

Now comes XO Illinois, Inc., (~~A~~XO~~@~~) by its attorneys, and as its motion to strike portions of the Answer of Ameritech and the Verified Statement of Ameritech Illinois (~~A~~Ameritech~~@~~) witness Eric L. Panfil, states as follows:

XO moves to strike portions of Ameritech's Answer and portions of Ameritech's Verified Statement on grounds that Ameritech has violated long-standing Commission policy by inappropriately revealing the parties confidential settlement negotiations in contravention of sound public policy considerations, and at the risk of jeopardizing the possibility of on-going negotiations. Additionally, XO moves to strike portions of Ameritech's response and portions of Ameritech Verified Statement on grounds that Ameritech failed to proffer its proposal prior to the close of the arbitration window.

**Factual Background**

1. On May 30, 2001, XO advised Ameritech that it would be opting into the interconnection agreement of Focal Illinois, Inc., as provided for in Section 252(i) of the Federal Telecommunications Act.
2. By letter dated June 18, 2001, Ameritech responded to XO's request stating that, based on

the FCC ISP Compensation Remand Order, Ameritech would not allow XO to opt into the rate for ISP-bound traffic as well as all terms and conditions related to reciprocal compensation including such items as routing, minutes of use, billing and payment terms.

*(In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic (AISP Compensation Remand Order)*, CC Dockets 96-98 and 99-98, FCC 01-131, Opinion and Order Adopted April 18, 2001.) In that letter, Ameritech indicated that it would provide to XO a proposal setting forth Ameritech's proposed language addressing the issues raised by the FCC Order. A copy of Ameritech's letter is attached to this motion as Attachment A.

3. On June 25, 2001, XO received Ameritech's proposal that had been promised in Ameritech's June 18, 2001 letter. That proposal provided the outline of an entirely new reciprocal compensation structure that contemplated bifurcating the per minute of use charges into a per call payment to recover setup costs and a per minute payment to recover costs varying with holding times. A copy of Ameritech's June 25<sup>th</sup> proposal is attached to this motion as Attachment B. Ameritech's proposal did not include any prices for reciprocal compensation for the setup or per minute charges. Counsel for Ameritech stated that it would provide the rates to XO when counsel received them from their client. However, as noted in paragraph 9 below, XO did not receive any price information for the bifurcated structure until the Verified Statement of Eric Panfil was filed in this proceeding on July 26, well after the arbitration window closed. Curiously, Ameritech does not mention the June 25<sup>th</sup> proposal in its Response or in the Verified Statement of

Eric Panfil. XO is unclear as to Ameritech's position concerning this initial offer, the only offer on the table at the time the arbitration window closed.

4. Ameritech's June 25, 2001 proposal included an additional attachment that provided rates for the payment of reciprocal compensation. Those rates, however, were the same in structure (i.e. non-bifurcated) and price to that contained in the Focal Agreement. In other words, the rates set forth in Ameritech's additional attachment contained a per minute charge for termination of all traffic. Nonetheless, the rates were not consistent with a bifurcated proposal as they did not include a setup and per minute charges. A copy of the relevant portion of the rate proposal is attached to this motion as Attachment C.
5. Shortly after receiving Ameritech's proposal, XO sent to Ameritech its counter-proposal for addressing the FCC Order. A copy of XO's proposal is attached to this motion as Attachment D. XO's written proposal was materially the same as the position it had been advocating with Ameritech on numerous occasions since it first requested that it opt into the Focal Agreement.
6. Later that same day, June 25, 2001, the day the arbitration window closed, XO filed the petition initiating this proceeding. In its petition, XO included its position on the issue of the proper rate for ISP traffic which is consistent with its proposal sent to Ameritech earlier that day.
7. As Ameritech stated in its testimony, on July 5, 2001, as part of the settlement negotiations, Ameritech sent to XO another proposal for the treatment of reciprocal compensation, entitled "Appendix Reciprocal Compensation".

8. On July 20, 2001, Ameritech filed its response to the petition. Attached to Ameritech's Answer, inter alia, was a document entitled "Appendix Reciprocal Compensation". Ameritech, however, had failed to present this appendix to XO during the course of pre-arbitration negotiations.
9. On July 26, 2001, Ameritech provided the verified statement of Eric L. Panfil purporting to support Ameritech's position. Ameritech then added the prices it proposed for the payment of reciprocal compensation for its bifurcated rate proposal (Panfil Schedule 1).

**Motion to Strike References to Negotiations and Settlements**

10. Long-standing Commission policy, consistent with sound public policy, requires that settlement negotiations remain confidential. To treat settlement negotiations otherwise would stifle discussions and impede the possibility of settlement. Ameritech's decision to disclose confidential settlement positions and discussions is unacceptable. The language identified below which references the parties' confidential settlement negotiations should be stricken.
11. Lines 10-19 on page 5 of Mr. Panfil's testimony contains information that is part of the parties confidential settlement negotiations and should therefore be stricken.
12. Additionally, lines 25-27 on page 6 Mr. Panfil's testimony contains information that is part of the parties confidential settlement negotiations and should therefore be stricken.
13. The indicated portions of Mr. Panfil's statements contain positions that XO has allegedly taken in its ongoing confidential settlement negotiations with Ameritech. It is inappropriate for the Commission to consider the statements made or positions taken by

parties in the negotiations that may or may not resolve some or all of the issues in this proceeding. Similarly, it is inappropriate for a witness in this proceeding to discuss the statements made or positions taken during negotiations. By failing to strike the above-referenced language, the Commission would effectively discourage continued negotiations during this proceeding, as well as in future proceedings, and would severely limit the parties from engaging in the give and take and compromise necessary for any serious negotiation.

14. XO wishes to continue to negotiate with Ameritech and believes that in the context of these settlement negotiations, the parties should be able to modify their previous positions in order to reach an acceptable compromise. However, Ameritech should not be allowed to discuss the settlement negotiations or the positions taken by the parties during the confidential exchanges, including those taken by Ameritech, on the record. To allow such disclosure undermines the entire settlement process and distorts the record in this proceeding.

**Motion to Strike Portions of Mr. Panfil's Testimony and Attachments**

15. The positions of the parties for purposes of this arbitration are their positions on the date the arbitration petition was filed. (83 Ill Code 761.110(b)) At the time of filing, Ameritech had not proposed its "Appendix Reciprocal Compensation". By its own admission, in the testimony of Mr. Panfil at page 5, Ameritech did not forward this Appendix to XO until July 5, ten (10) days after the window had closed. Additionally, Ameritech did not include pricing in this document. In fact, the bifurcated pricing information was not provided to XO until Mr. Panfil submitted his Verified Statement in

this proceeding on July 24. As noted above, the only price information that had been provided by Ameritech as of the date of the filing of the Petition were prices for a standard single rate that was consistent with the proposal of XO.

16. Line 38 of page 4 to line 3 of page 25 of Mr. Panfil's testimony raises issues which were not raised until after the arbitration window had closed and therefore should be stricken.
17. Parties to an arbitration proceeding should be encouraged to seriously negotiate and if possible settle issues. The best time to accomplish such negotiation is before the aggrieved complaining party initially files an arbitration. Ameritech's lack of intent to negotiate is revealed by its repeated failure to provide a necessary element of settlement, the very rates that the parties dispute. To allow Ameritech to wait until it sees the basis of an arbitration complaint before seriously negotiating is simply bad public policy that could encourage tardy and fruitless efforts to resolve real disputes. In the interest of fairness and administrative certainty, and in the interest of furthering the goals of the Federal Telecommunications Act, the Commission should not base its decision on Ameritech's late filed proposals made subsequent to the filing of XO's petition.
18. Since Ameritech failed to offer its "Appendix Reciprocal Compensation" during the interconnection negotiation period, the Commission should reject any consideration of that proposal (Attachment B to this Motion). Instead, the Commission should only consider whether XO's proposed structure for reciprocal compensation, using the rates proposed by Ameritech in Attachment C to this Motion, meet the standards set forth in the Federal Act.
19. The Commission should therefore strike Appendix Reciprocal Compensation from

Ameritech's Answer and it should strike from Mr. Panfil's testimony all reference to Appendix Reciprocal Compensation. Attached to this Motion as Attachment F is a redlined version of Mr. Panfil's testimony.

20. Additionally, the Commission should strike all references from Ameritech's Response to XO's Petition pertaining to matters raised subsequent to the arbitration window closing date. Attached to this Motion as Attachment G is a redlined version of Ameritech's Response to XO's Petition.

WHEREFORE, for the reasons set forth above, the Commission should take the following actions:

1. Strike the Appendix Reciprocal Compensation from Ameritech's Response.
2. Strike the price list attached to Mr. Panfil's testimony as Schedule 1.
3. Strike the portions of the testimony of Mr. Panfil addressing the parties' negotiation and settlement positions.
4. Strike the portions of Mr. Panfil's testimony, listed in paragraph 15 above, concerning issues raised subsequent to the closure of the arbitration window.
5. Strike portions of Ameritech's Response to XO's Petition as indicated in Attachment G.
6. Grant such other relief as is just and reasonable.

Respectfully Submitted

By:\_\_\_\_\_

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